IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1106-2016**
	:	
vs.	:	
	:	
	:	
LEANNE APPLEGATE,	:	
	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's judgment of sentence dated September 24, 2018 and docketed on September 26, 2018.

During the night on March 24, 2016, Leanne Applegate (hereinafter "Applegate") was at her residence and her six children were asleep inside. Applegate's husband had been out drinking with his friend, Justin Hill, and Hill's fiancé, Amanda McEwen. Mr. Hill drove Applegate's husband home from the bar in the husband's truck, while Ms. McEwen drove a van to the residence so that Mr. Hill and Ms. McEwen could drive home. Mr. Hill parked the truck in the driveway away from the residence, and Ms. McEwen parked the van in the driveway near the residence behind Applegate's vehicle. Mr. Hill and Applegate's husband sat in the truck talking. Ms. McEwen beeped the horn of the van, but they continued to sit in the truck and talk. Ms. McEwen began to cross Applegate's yard toward the truck. Applegate heard the horn beeping and exited her residence. Due to a previous altercation between Ms. McEwen and Applegate, Applegate told Ms. McEwen to get off the property and an argument ensued. Applegate returned inside the residence. Ms.

McEwen proceeded to the truck, spoke to the men, and then walked back across the yard to the passenger seat of the van. The men walked to the van and continued their conversation with Mr. Hill in the driver's seat and Applegate's husband standing at or near the driver's door. Applegate exited the residence with a handgun in her hand. She yelled at Ms. McEwen and waved the handgun at her. Ms. McEwen exited the van and yelled back. When Applegate turned around to return to her house, Ms. McEwen followed her and pushed her in the back. At that point, Applegate's husband escorted Applegate back to the house and Ms. McEwen and Mr. Hill left in the van. The next morning Ms. McEwen called the police.

On May 5, 2016, the Pennsylvania State Police filed a criminal complaint against Applegate, charging her with persons not to possess a firearm and recklessly endangering another person.

Trial was scheduled for June 14-15, 2018. On May 30, 2018, the Commonwealth filed a motion in limine to preclude Applegate from making any reference to self-defense or justification, as the facts that would be presented at trial would not be sufficient to establish that defense or to warrant a jury instruction regarding that defense. The court held an argument on June 5, 2018 on the Commonwealth's motion. In a decision dated June 7, 2018 and filed on June 8, 2018, the court granted the Commonwealth's motion and precluded Applegate from presenting any claim of self-defense or justification. On June 11, 2018, Applegate filed a motion for reconsideration. Due to the impending trial, the court held an argument later that same day and denied Applegate's motion.

On June 12, 2018, Applegate waived her right to a jury trial, and the parties agreed to proceed immediately to a non-jury, case-stated trial. The court found Applegate

guilty of persons not to possess a firearm, but not guilty of recklessly endangering another person. In the verdict, the court indicated that it would permit Applegate to present the evidence she proffered in support of her self-defense or justification claim as potential mitigating evidence at sentencing.

On September 24, 2018, the court sentenced Applegate to incarceration in the Lycoming County Prison for a minimum of 11 months and a maximum of 23 months to be followed by three years of probation under the supervision of the Lycoming County Probation Office. The court acknowledged that the sentence was below the mitigated range and stated its reasons for such a sentence on the record and within the sentencing order.

On October 1, 2018, the Commonwealth filed a motion for reconsideration of sentence. Following a hearing on November 2, 2018, the court denied the Commonwealth's motion.

The Commonwealth filed an appeal. Shortly thereafter, Applegate filed an appeal.

The Commonwealth asserts that the court abused its discretion by imposing a sentence significantly below the mitigated range of the sentencing guidelines, which was unreasonably lenient under all the circumstances.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting

Commonwealth v. Hoch, 936 A.2d 515, 517-518 (Pa. Super. 2007). Sentences must be consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. *Commonwealth v. Ali*, 197 A.3d 742, 765 (Pa. Super. 2018).

When imposing a sentence, the court is required to consider the particular circumstances of the offense and character of the defendant. *Edwards*, 194 A.3d at 637. The sentencing court "should refer to the defendant's criminal record, age, personal characteristics and potential for rehabilitation." *Id.* Moreover, where a court is informed by a presentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations. *Commonwealth v. Ventura*, 975 A.2d 1128, 1135 (Pa. Super. 2009).

Pursuant to 42 Pa. C.S.A. §9781(a), the court must consider the nature of the offense, the history and circumstances of the defendant, the advisory guidelines promulgated by the sentencing commission, the pre-sentence report, if any, as well as the court's observations of the defendant.

The term "unreasonable" commonly connotes a decision that is "irrational" or "not guided by sound judgment." *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007). The sentencing judge has broad discretion in determining a reasonable sentence, as it is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. *Id*. at 961. As well, when a court has been informed by a pre-sentence report, its discretion should not be disturbed. *Ventura*, 975 A.2d at 1135. Finally, the court enjoys an institutional advantage, bringing to its decisions an expertise, experience and judgment that should not lightly be disturbed. *Walls*, 926 A.2d at

961.

At sentencing, the court shall make as part of the record and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. *Commonwealth v. Cartrette*, 83 A.3d 1030, 1041 (Pa. Super. 2013). The judge, however, does not need to give a lengthy discourse explaining its reasons. *Commonwealth v. Crump*, 995 A.2d 1280, 1283 (Pa. Super. 2010). The record as a whole must reflect the court's consideration of the facts of the crime and character of the defendant. *Id*.

> The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for purposes of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions.

Commonwealth v. Soto, 2018 PA Super 356, 2018 WL 6816969, *14 (Pa. Super. 2018)(quoting *Commonwealth v. Reese*, 31 A.3d 708, 715-716 (Pa. Super. 2011)(en banc)(citations omitted)).

At the time of sentencing, Applegate was 34 years old. She is the mother of six minor children. She was involved in her church and her children's school. Her risk/needs assessment indicated she was a minimum risk and had a very low probability of recidivism. Although her prior record score was a 3 based on a convictions from June 2006 in case CR-1543-2005 for delivery of a controlled substance, an ungraded felony, and criminal use of a communication facility, a felony of the third degree, she had never been incarcerated previously. She was placed on Intermediate Punishment for those offenses, which she successfully completed. She remained crime-free for nearly 10 years.

This crime was an isolated incident. It evolved out of Applegate's previous

traumatic events in her life, and her deteriorated relationship with Ms. McEwen (who was formerly her best friend), which caused her to overreact to Ms. McEwen's presence on her property. The court had absolutely no concern that Applegate would commit any crime of violence with the weapon. Contrary to Ms. McEwen's testimony and the Commonwealth's arguments, the video of the incident did not show Applegate pointing the firearm or the laser sight at Ms. McEwen's chest. Rather, Applegate brought the firearm out of the house and waved it around in an effort to get Ms. McEwen to leave her property. Ms. McEwen clearly was not frightened by the presence of the firearm as she continued to argue with Applegate and, when Applegate turned to return to her residence, Ms. McEwen followed Applegate and pushed her in the back.

The court found that the gun was not loaded during the incident but ammunition was available to Defendant. Therefore, the court utilized an offense gravity score of a 10.

While the standard sentencing guideline range is 42 to 54 months, which would be a state sentence, the guidelines are advisory only. They are a starting point from which the court is permitted to deviate based not only on the facts and circumstances of the crime but also the rehabilitative needs of the defendant.

The court found that a sentence of county incarceration followed by a period of probation would be sufficient to protect the public and to rehabilitate Applegate. If Applegate violated her probation, the court could revoke her probation and impose a state sentence at that time.

The court considered the seriousness of the crime when it imposed the county

sentence. In fact, the court considered all of the appropriate factors; it simply did not weigh them in the manner that the Commonwealth desired. The court even noted that it did not believe that Ms. McEwen wanted Applegate to go to state prison.

The court did not impose a county sentence due to prejudice, partiality, bias or ill will. The court imposed a county sentence because, after considering all of the factors, not just the crime or its grading, it found that a county sentence followed by a period of probation was sufficient to protect the public and rehabilitate Applegate.

Applegate contends the court erred in denying her proffer of justification/self-defense. The facts and circumstances of this case did not support justification/self-defense. Despite the litany of historical information regarding prior incidents between Applegate and Ms. McEwen and the allegation that, in response to Applegate's demand for McEwen to "get off her property and to remove her car from [Applegate's] driveway so [Applegate] could leave with her children," McEwen allegedly stated she could come in that house any time she wanted to f—k up Applegate and any of her children, McEwen did not possess a weapon and she never made any attempt to enter Applegate's residence that night.

"When the proffered evidence supporting one element of the defense is insufficient to sustain the defense, even if believed, the trial court has the right to deny the use of the defense and not burden the jury with testimony supporting other elements of the defense." *Commonwealth v. Billings*, 793 A.2d 914, 916 (Pa. Super. 2002). The proffer in this case was insufficient to establish multiple elements.

Applegate was not faced with a clear and imminent harm, but rather one that was debatable or speculative. It is undisputed that, whatever incidents may have occurred

between Applegate and Ms. McEwen in the days or weeks prior, Applegate was inside her residence when Ms. McEwen, Mr. Hill and Applegate's husband arrived in the driveways on Applegate's property. Ms. McEwen did not visibly possess any weapon, attempt to enter Applegate's residence or attempt to use any force against Applegate before Applegate exited her residence with a handgun in her hand. Applegate simply was not faced with any clear and imminent harm which required her to possess a firearm. See *Commonwealth v. Merriweather*, 555 A.2d 906, 911 (Pa. Super. 1989)(despite allegedly receiving telephone threats by individuals against whom he testified in a murder trial, appellant was not justified in carrying a firearm as the alleged threats did not constitute clear and imminent harm and there was a legal alternative available to appellant, i.e., notifying the authorities and informing them of the threats).

Applegate also clearly had several legal alternatives other than resorting to arming herself with a firearm, which she was precluded from owning or possessing due to her felony drug conviction. Applegate could have remained inside her residence instead of going outside and confronting Ms. McEwen. She could have locked her doors and kept a watchful eye on the door leading upstairs from the basement door which allegedly was broken and could not be locked. Despite the fact that it would take some period of time for them to arrive, Applegate could have called the police or told Ms. McEwen that she would call the police and have her arrested if she did not leave the property. Applegate also could have armed herself with any weapon other than a firearm, such as a knife or a baseball bat.

The legislature has also acted to preclude the defense. It is undisputed that Ms. McEwen never attempted to enter Applegate's residence and she was not in visible

possession of a firearm or any other weapon capable of lethal use. Therefore, Applegate had a duty to retreat because she was in illegal possession of a firearm. See 18 Pa. C.S. §505(b)(2.3).

Despite Applegate's husband's comments regarding the Second Amendment during the sentencing hearing, Applegate did not have a Second Amendment right to possess a firearm. She lost her Second Amendment right to possess a firearm when she committed a felony drug offense. Restrictions on firearm possession by convicted felons do not violate the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 2816 (2008)("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill…."); *Commonwealth v. Grove*, 170 A.3d 1127, 1147 (Pa. Super. 2017).

Applegate's arguments that she did not know she could not possess a firearm were not relevant at trial, as ignorance of the law is not a defense. *Commonwealth v. Henderson*, 938 A.2d 1063, 1067 (Pa. Super. 2007)("[I]t is axiomatic that ignorance of the law is not a defense."). She was aware of her drug conviction and she was aware she possessed a firearm.

Finally, in light of the Pennsylvania Superior Court's decision in *Commonwealth v. Cannova,* 199 A.3d 1282 (Pa. Super. 2018), Applegate's claim that the court erred in denying her proffer of justification/self-defense clearly lacks merit.

The facts of *Cannova* are as follows:

> Appellant was staying at a carriage house near West Chester University on Halloween night in 2015. That night, the victim and his

> friends went out into the town of West Chester with minimal Halloween costumes. Some testimony indicated they were intoxicated. At 1:17 a.m., they purportedly attempted to enter what they believed to be a party around the carriage house, but were denied entry. The victim, and possibly others, subsequently banged on Appellant's door. Testimony varied as to the number of times the group banged on Appellant's door, though Appellant testified that he heard repeated, loud strikes.
>
> Testimony also revealed that Appellant had a closed-circuit television that permitted him to see the area outside his door. Appellant fired a .40 caliber semiautomatic pistol at the door, without opening it. The bullet went through the door and struck the victim through his small intestine and colon. The police would later discover that, due to Appellant's prior criminal record, Appellant did not lawfully possess the gun he fired at the door. The victim survived, and police charged Appellant with [attempted murder in the first degree, aggravated assault, recklessly endangering another person, simple assault, and persons not to possess a firearm.]

Id. at 1285-1286. Appellant raised a claim of self-defense at trial and specifically requested a charge directing the jury to consider the castle doctrine, 18 Pa. C.S. §505, which would specifically inform the jury of a presumption of a reasonable belief that deadly force was necessary for Appellant to defend himself. The trial court denied the request on two alternative grounds: (1) lack of evidence that the victim was unlawfully and forcefully entering the carriage house; and (2) Appellant's unlawful possession of a firearm constituted criminal activity which precluded the castle doctrine instruction. In upholding the trial court, the Superior Court stated: "We agree with the trial court's assessment that by picking up the firearm while not in imminent danger from the victim, Appellant's action was not justifiable under Chapter 5 of the Crimes Code."

Here, as in *Cannova*, Applegate was not in imminent danger from the victim. Ms. McEwen was unarmed and never even approached the door to

Applegate's residence. She merely crossed the yard to try to retrieve her fiancé so that they could leave the property. Applegate was also precluded from possessing a firearm. Under these circumstances, Applegate's actions were clearly not justifiable under Chapter 5 of the Crimes Code.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire/Kirsten Gardner, Esquire (ADA)
George Lepley, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)